No. 2495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KEANE WONDER MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

JAMES CUNNINGHAM,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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By F. D. Monckton, Clerk. *Deputy Clerk.*

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

The plaintiff in error, Keane Wonder Mining Company, respectfully asks a rehearing in this case that further consideration may be given to facts which are misconceived in the opinion, and consequent erroneous conclusions based thereon.

We respectfully submit that the Court has erred in stating the facts in its opinion, and that therefore

the reasoning, deductions and conclusions based thereon are unfair, and unjust to petitioner.

The Court will remember that Cunningham recovered judgment in the sum of twelve thousand, five hundred dollars ($12,500) for injuries (to wit, a broken leg) sustained while in the employ of the Mining Company in what is known as the "Keane Wonder Mine". *It was claimed that the injury was caused by the falling of loose rock which the Mining Company carelessly and negligently allowed to remain on the roof or top of a stope in which Cunningham was at work.*

The three elements of negligence charged in the amended complaint may be fairly summed up as follows:

(1) *In not properly timbering said stope.*

(2) *In not properly examining and inspecting same.*

(3) *In not properly picking or barring down the loose rock at the roof or top of said stope.*

These three items include all the negligence charged against the Mining Company. With issues framed upon these allegations the company was forced to trial. *The case was tried upon the theory thus developed.* The Mining Company prepared its defense accordingly. We submit, therefore, that *if the judgment in favor of Cunningham can not be sustained upon the evidence introduced under the pleadings, it ought not to be sustained by this*

Court upon any other theory of negligence not alleged.

We direct the Court's attention to the following errors in the opinion arising from inaccurate statements of facts or erroneous deductions or conclusions necessarily following from a misconception of facts.

(a) The second paragraph of the opinion states that it is contended (by plaintiff in error) that error was committed by the Court below in denying a motion for nonsuit or instructed verdict in favor of the Mining Company, for the reason that the evidence conclusively shows that it was the duty of Cunningham, before working in the place where he was injured, to *examine the roof of the stope and bar down any loose material that might remain thereon,*—in other words, it was Cunningham's duty to make his place of work safe.

No such contention was made by the company in the Court below, or in this Court, nor did it intend to do so. Certainly, no such contention can be gathered, either from the record, or from our brief.

Tr. p. 44, par. 5;
Tr. p. 46, par. 10;
Tr. p. 136, par. 4.

We admit that such a contention was made to the jury in the Court below;—there Cunningham and his witnesses testified that no such duty rested

upon the muckers;—the company and its witnesses testified to the contrary. A clear conflict of evidence *which the verdict of the jury finally foreclosed in favor of Cunningham.*

Such contention not having been made in this Court, and having no foundation in the record, is, of course, out of place in the opinion, and any reasoning or conclusions based thereon must necessarily be unsound, so far as the merits of this case on this appeal are concerned. For instance, the opinion continues:

> *"The view of the court below on this branch of the case is shown where, in denying the motion for a nonsuit,* it said (quoting the last paragraph of the opinion of the court below in denying the motion for a nonsuit)."

The Court below did not consider "this branch of the case", for such contention was not made or advanced as a reason why a nonsuit be granted. The language quoted in the opinion as having been used by the learned trial judge was used without reference or thought of any such contention, and in an entirely different sense and understanding.

(b) The opinion states:

> *"At the place where the accident occurred the hanging wall was graphitic schist."*

This statement is erroneous. The country rock and the hanging-wall in the Keane Wonder Mine is *schist, and not "graphitic schist"* (Tr. p. 153). As to this fact there is no controversy.

(c) The opinion recites that

> *"Between the ore body and the hanging wall there was a gouge, varying in thickness from 1 to 18 inches, and soft, black graphitic schist, the presence of which rendered any body hanging below it likely to become detached from the hanging-wall."*

The only testimony in the record having any reference whatever to this subject is the testimony of Mr. Homer Wilson, the president of the company, found at page 163 of the transcript, as follows:

> "The country rock at that mine is schist. The foot wall many times has a dike on it, a diorite dike, *but the hanging wall is always schist. There is no gouge on the schist wall to speak of; these is a little—well, no, you can't call it a gouge proper at all. It is a seam between the quartz and the schist. It is a graphitic schist, caused by grinding and rubbing against it. It varies from the thickness of your hand to 18 inches, always dry.* The color of the seam or soft spot is black. The schist wall itself is black, but not quite as dark; there are two kinds of schist, graphitic and mica. The mica schist is a shade lighter than the graphitic. Where this cave was it was of that character, graphitic schist lying right against the other. It lies in slabs. The ore was white quartz carrying two to four per cent sulphides."

From this testimony no Court could say that there was a gouge between the ore body and the hanging-wall. Mr. Wilson says: *"You can't call it a gouge proper at all. It is a small seam of dry graphitic schist."* A gouge is understood, among miners, as being a small soft body with no power whatever

to hold any two bodies together. If this graphitic schist was a true gouge, and there was any evidence in the record establishing the fact that it was such, then this Court would be warranted in its deduction that the presence of such gouge rendered any body hanging below it likely to become detached from the hanging-wall. If it was a gouge, no ore would ever remain on the hanging-wall but all ore would fall of its own weight after shooting the holes drilled by the piston machines.

There is no evidence in the record that the presence of this seam of graphitic schist in any way weakened the connection between the ore body and the hanging-wall proper.

As a matter of fact this small seam of graphitic schist is a feature of this mine. It is there today. It is as hard and as tenacious as the quartz itself. *Great bodies of quartz daily hang suspended from the hanging-wall with this seam of graphitic schist between it and the hanging-wall proper. Cunningham and Perez worked all day on December 9th, 1911, under ore suspended from the hanging-wall* (Tr. pp. 84, 114).

As a matter of fact every miner in that mine works under like conditions. It is the only way to mine the ore. Never in the history of the mine, and the record so disclosss, had any injury to any employe resulted on account of ore falling from the hanging-wall. This seam of graphitic schist is

always present and surely a mining company should have the right to rely upon the law of nature as proven by actual operation and experience. If companies have to guard against every possible injury to employees then the law will close many low grade mines in this state.

It is mere conjecture, and a wholly erroneous and fallacious conclusion, to assume that the presence of this graphitic schist in any way renders the ore body hanging below it dangerous to the employees working thereunder.

The record discloses that the Keane Wonder Mine is a dry mine,—no moisture of any kind. As a fact, and outside of the record, we are able to advise the court that after the quartz has been removed from the hanging-wall, and the outside air and the moisture therefrom comes in contact with the schist, the result is, after a considerable period of time, a year or more, that the schist softens, *as compared with its former condition,* and flakes, and frequently in the old abandoned portions of the mine, the schist falls, but there has never been known in the history of that mine any portion of the schist wall to flake off and fall during the time that the employees are engaged in extracting ore.

The uncontradicted evidence in the case is that after the ore has been removed by the piston machines, the ore on the hanging-wall can only be got down by blasting, with holes drilled not more than 18 inches apart, and exploded by a specially

high power dynamite, *and that the ore can not be taken down in any other way.*

Tr. pp. 170-171;
Tr. pp. 184-185-186;
Tr. p. 232.

This Court further states:

> *"The tendency of the blasting which followed the use of the Waugh drills was to loosen the ore which might still remain thereafter on the hanging-wall."*

In view of the testimony above referred to, as to the character of the formation, the toughness of the ore, the method of breaking the ore down from the hanging-wall, and the difficulty experienced in this mine in getting it down, we respectfully submit that the above statement by the court is an unauthorized assumption not supported by evidence and not true as a matter of fact. *There is no evidence that the blasting had any tendency whatever to loosen any of the ore remaining on the hanging-wall.* We believe that we are warranted in stating in this petition that blasting in that mine has no effect whatever on the ore body not immediately affected by the force of the explosion; in other words, never in the history of that mine has any part of the ore body fallen by reason of an explosion in any other part of the mine. The method of extracting the ore is set forth fully in the record. The only way it can be gotten down is by drilling holes and blasting it down, and even after holes are drilled and shots are fired, portions of the ore body

remain on the hanging-wall. There is no controversy in this case on this question.

The evidence shows conclusively that the Mining Company daily inspected the hanging-wall. Cunningham, himself, testified that before any mucker was allowed to go to work that a miner was sent in ahead in order to make the place safe. The company had a foreman, and a superintendent to look after the safety of the mine and its employees. Very frequently the president went through the mine for the purpose of inspection.

The evidence in the case conclusively proves that *whenever any loose rock or dangerous rock was observed it was either barred down or shot down.* The opinion of this Court so holds.

The evidence quoted in the opinion establishes the utmost vigilance and diligence on the part of the company in the matter of inspection and care of the roof or hanging-wall, and the barring down of any loose rock that might be found which might prove dangerous to employees.

It is important to note that the evidence on the part of Cunningham as well as the evidence on the part of the company, conclusively establishes extraordinary caution and care by the company in the operation of its mine. There is no evidence of failure to inspect dangerous conditions, nor is there any evidence that the company failed to bar down any loose rock or remedy any dangerous condition known to it, or which should have been known to it.

The evidence clearly established this most important duty, to wit, *inspection.*

There is no question but that the duties complained of, were discharged by the company; the *contention in the Court below being as to who performed them.*

In order to make a *prima facie* case under the Roseberry Act, Cunningham had to prove that he was injured *whilst engaged in the line of his duty, and in the course of his employment; he also had to prove that the breach of duty charged against the company was not such as he was specially employed to do.* In other words, in order to make a case and escape a nonsuit, it was necessary for Cunningham to prove that it was not a part of his duties to timber the stope in which he was at work, nor was it a part of his duties to examine and inspect the stope for probable dangers, nor was it a part of his duties to pick or bar down the loose rock at the roof or top of the stope. The court is familiar with the rule of law that where an employee is engaged in a hazardous enterprise, and he himself is engaged in such work as brings about a constantly changing condition, or he is specially employed to remedy the dangers causing the injury complained of; that it is the duty of that employee to make his place of work safe, and if he is injured in consequence of failure so to do, he is guilty of such negligence as will bar recovery.

19 L. R. A. 352;

Petaja v. Aurora Mining Co., 106 Mich. 463;

32 L. R. A. 435;
58 A. S. R. 504;
64 N. W. 335;
66 N. W. 951.

This Court should take judicial notice of the fact that driving a stope in an ore body such as is described in the record, is, in the nature of things, a dangerous occupation, one in which the place of work is constantly changing as the work progresses. *Some employee must today make safe the place that he and his fellow employees are to work tomorrow.* That is what he is employed to do. Cunningham, of course, took the position that it was not the duty of the muckers to examine the roof or to bar down loose rock; he placed that duty upon the miners or machine men, and in his effort to shift that responsibility, conclusively proved not only the exercise of ordinary care and diligence which the law demands of the company, but extraordinary precaution and care against the alleged dangers complained of. Calm reflection leaves the impression that there is a world of wisdom in Shakespeare's *"Methinks the lady doth protest too much."*

As already conceded, the verdict of the jury concludes the controversy as to whose particular duty it was. The evidence in this regard was conflicting. Whether the jury's conclusion was right or wrong the legal consequence to the company was and is that this particular defense was then and there lost to it. *But this does not mean that the company*

is thereby precluded from insisting that Cunningham proves his case by legal and sufficient evidence.

We direct the Court's attention to the language used in the opinion in reference to this subject:

> "The defendant contends that this duty of inspection and barring down rested upon the muckers, and argues that *it had discharged its full duty in placing that burden upon the muckers, and that therefore it was not negligent.* But the plaintiff testified otherwise * * * The defendant offered testimony to the contrary. We have nothing to do however, with the weight of the testimony."

As an abstract proposition the foregoing is undoubtedly correct, but, as we have already said, this Court has in some manner gained an erroneous impression of the position taken by the company on this appeal;—therefore, this and similar parts of the opinion, and the conclusions based thereon, are erroneous, and should be eliminated. If the judgment is to be affirmed, different reasoning should be assigned.

To repeat: the evidence fails to prove negligence on the part of the company, either in not properly timbering the stope, or in not properly examining and inspecting same, or, in not properly picking or barring down the loose rock at the roof or top of the stope.

In fact there is not a scintilla of evidence in the case proving negligence on the part of the company in the particulars charged in the amended complaint, and for which it was hailed into Court to

defend itself. Cunningham proved daily inspection of the dangers complained of, to wit: loose rock at the roof or top of a stope; also that the company never allowed muckers, the class to which he belonged, to go to their place of work unless preceded by an experienced miner who first barred down the loose rock and made the place safe for the mucker, and even after doing so, the mucker did not go to the place until he was told that it was safe. The evidence further established the fact that the company employed two competent and experienced men who daily inspected the mine, Mr. Roper and Mr. Keith. As quoted in the opinion, Cunningham himself testified that

> *"sometimes the foreman himself would bar down the loose rock and see that the place was safe before we would go in there to work."*

To demand more of the company would be equivalent to saying that it must under all circumstances and conditions make the place of work safe in any event. This the law does not require.

Thompson on Negligence, Vol. IV, p. 370, Sec. 4191;

26 Cyc. 1102;

Brymer v. S. P. Co., 90 Cal. 496;

Thompson v. California Construction Co., 148 Cal. 35.

(e) The opinion holds:

> "This is not a case in which the only evidence of negligence is the fact of the accident. The jury may have found negligence in the fact

> alone that ore was allowed to remain on the hanging-wall, *or that there was want of proper care in inspecting the ore hanging from the roof underneath which the plaintiff was put to work, there being evidence tending to show that a proper inspection and testing of the rock would have disclosed the fact that it was likely to fall.*"

The opinion holds that the verdict of the jury was justified in that there was evidence of want of proper care in inspecting the ore hanging from the roof underneath which plaintiff was put to work. *There is no evidence in this case of negligence or carelessness, however slight, in respect to the duty of inspection.*

In the Court below this question was put at rest by the ruling of the learned trial judge in denying our motion for nonsuit, when he held:

> "*Hence the failure to inspect does not seem to me to have been established.*"

The learned trial judge also held:

> "*There is no showing that any of the employees were incompetent.* Much was said about the failure to give warning. *When the duty to warn is present,* it necessarily predicates not only that there is danger, and reasonable cause therefor, but it also predicates not only that there is danger, and reasonable cause therefor, *but it also predicates the fact that the party upon whom the duty is laid must know of the danger, or must have some cause to apprehend it, or could have discovered it if he had performed his duty.*
>
> *But so far as the evidence shows, such an accident never occurred before.* It does not

> appear from the testimony that any ore or rock ever fell from the roof of that chamber before. The chamber was in the neighborhood of 600 feet in circumference. It must have been something like 200 feet in diameter. At points the roof was 20 feet from the floor, at others it was in the neighborhood of 60 feet. *The supports and pillars were few in number, but in the absence of any showing that these were insufficient I do not see how we can assume that there was any negligence on that score.* If it had appeared that caves were frequent, then there would have been evidence tending to show the company was negligent in failing to have proper supports for the roof, *but there is nothing of that sort here."*
>
> (Tr. pp. 137-140.)

The learned trial judge correctly disposed of the alleged negligence of failure to make proper inspection and examination, and likewise disposed of the duty to warn. The lower Court disposed of every contention raised by the pleadings in favor of the company. *It submitted the case to the jury upon the theory that the falling of the ore itself was a fact tending to show negligence.* The fallacy of this position is that the alleged negligence, to wit: either the falling of the ore itself, or the leaving of an enormous body of ore on the hanging-wall, *was not alleged by Cunningham as a part of his cause of action. Such negligence is entirely without the scope of the pleadings,* and was the last straw which the astute counsel for defendant in error grasped in struggling to overcome our motion for nonsuit.

Cunningham did not complain that it was negligence on the part of the company to allow ore to remain on the hanging-wall, but he did complain that it was negligence to allow loose ore or rock to remain on the hanging-wall where it was liable to fall and injure him while engaged at his work. When we came into court we expected to rebut the charge that we allowed loose rock to remain on the hanging-wall so as to be dangerous to our employees. We expected to rebut the testimony that we were careless and negligent in the matter of inspecting our hanging-wall. We expected to rebut testimony that we failed and neglected to properly timber our mine. This we did successfully, and at the 11th hour, Cunningham switched his position as to alleged negligence and succeeded in convincing the lower Court that the negligence proven and for which the company must respond in damages, *was the alleged negligence of leaving a large body of ore on the hanging-wall.*

> "A material variance between the allegations and the proof in an action by a servant against his master, for personal injuries, is fatal."
>
> 26 Cyc. 1408.

Such a contention is utterly ridiculous. If this Court will carefully read the testimony of Cunningham and his witnesses it will find that every employe in that mine each day worked under a body or ore remaining on the hanging-wall, many times in size and weight the body of ore which fell and

injured plaintiff. It was and is the usual and customary way to work that mine. It was and is necessary to remove the lower portion of the ore by piston machines, allowing the upper portion to remain on the hanging-wall. Miners and muckers worked under this ore on the hanging-wall. There is no evidence of any other accident by reason of the falling or ore from the hanging-wall. No human being has ever been able to get ore down from that hanging-wall after the piston machines have taken out the lower portion, without drilling holes not less than 18 inches apart, and shooting it down with a special high-power dynamite;—and even after holes have been so drilled, loaded and exploded, portions of the ore oftentimes remain on the hanging-wall.

(f) The opinion further states:

> *"There being evidence tending to show that a proper inspection and testing of the rock would have disclosed the fact that it was likely to fall."*

This is the crux of the case. If there is any evidence in the record showing or tending to show, that a proper inspection and testing would have disclosed the danger, *then we withdraw our petition for rehearing, and consent that the judgment be affirmed,* but there is not a scintilla of evidence in the record, direct or indirect, which in any way proves, or as a matter of law, charges the company with knowledge, that the rock which fell was loose and dangerous, or that it was likely to fall. It

was inspected daily; it was tested by Mr. Roper and Mr. Perez, and pronounced safe. There is no evidence of any fact which in any way charges the company with constructive knowledge of this alleged danger. There is no evidence that plaintiff, or any other employee ever complained that it was dangerous. There is no evidence that the company had any knowledge that it was even loose, and, finally, there is no evidence of any extraneous fact which did, or which should have put the company on inquiry concerning this alleged danger. *In every case of similar character in which a mining company had been held liable by reason of rock or ore falling from the roof of its mine, some fact has existed which either proved that the company had actual knowledge of the danger prior to the accident, or that the fact which came to the knowledge of the company was such that a reasonably prudent man, exercising ordinary care, would have notice of the alleged danger.*

To illustrate our position, and to emphasize the failure of proof in the case at bar we request the Court to examine and consider carefully the following authorities, which we believe to be in line with the weight of authority in this country, and conclusive in our favor:

> "Mine owners are bound to exercise reasonable care and skill and to adopt all reasonable means and precautions to lessen the danger to their employes from the falling of portions of the roof of the mine; *but they are not insurers, in favor of their miners, that the roof*

of their mine will be at all times so propped that it absolutely will not fall, either under the principles of the common law, or, it may be assumed, under the statute law."

Thompson on Negligence, Vol. 4, p. 370, Sec. 4191.

"In order to charge the owner or operator of a coal mine with negligence because of the falling of loose rock or earth from the roof of the mine, he must have had previous knowledge of a defective or dangerous condition of the roof, or, by the exercise of ordinary care and caution, have been able to discover the defective condition."

Cherokee Coal Co. v. Britton, 45 Pac. 100;

Con. Coal Co. v. Scheller, 42 Ill. App. 619;

S. W. V. Co. v. Andrew, 86 Va. 270; 9 S. E. 1015;

Bird v. Utica Mine, 84 Pac. 256;

Grant v. Varney, 40 Pac. 771.

*"The master's liability for injuries to a servant arising from defects in the place for work, * * * is dependent upon his knowledge, actual or constructive, of such defects."*

26 Cyc. 1142.

"A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant, and which could not be discovered in the exercise of reasonable care and diligence."

26 Cyc. 1145, note 92.

"In order to hold a master liable for injuries to his servant alleged to have been caused by

> the unsafe methods of work adopted by him, it must be shown that he had, or ought to have had, knowledge of the danger."
>
> 26 Cyc. 1156, note 35.

By way of illustration, we desire to direct the Court's attention to the facts of a number of cases of similar character.

In the case of Collins v. Greenfield, 51 N. E. 454, decided by Mr. Justice Holmes, then of the Supreme Court of the State of Massachusetts, a judgment was sustained in favor of plaintiff.

Collins was crushed by a rock which fell upon him. The superintendent put Collins to work. Above him was a large overhanging rock, which looked safe from where Collins was at work, but which in fact was not safe, and had a large crack behind it.

There was evidence that the superintendent had been told that the rock which fell upon Collins could and ought to be barred down without further blasting, and that the superintendent said that he would see it. He did not attend to it; the rock fell. Collins was injured, and the Supreme Court of Massachusetts rightfully held that the defendant was liable for the reason that there was evidence that the superintendent had been notified of the dangerous overhanging rock.

In the case of Western Anthracite Coal and Coke Co. v. Beaver, 192 Ill. 333, 61 N. E. 335, a verdict for plaintiff was sustained by the Supreme

Court of the State of Illinois. *There was evidence that the deceased had informed the pit boss that the rock was liable to fall, and that it was dangerous, and that he had ordered props for it, which the boss promised to send, but failed to do so, and the rock fell, causing the death of the employe.* There can be no question but that this case was rightfully decided. Here the pit boss was notified that the rock was dangerous. Props were requested to support it. He promised to send same, but failed to do so.

In the case at bar there is no such evidence of neglect on the part of the Keane Wonder Mining Company.

In the case of Coal Valley Mining Company v. Haywood, 98 Ill. App. 258, it was held that a mine owner is liable if the general manager fails to prop the roof entry, *if he knows that it is dangerous.*

In Bird v. Utica Gold Mining Company, 2 Cal. App. 674, 84 Pac. 256, a verdict in favor of plaintiff was upheld for the reason that the *evidence established that the mining company knew that water was percolating through the ground immediately above the stope,* and that by reason thereof the ground had become softened, disintegrated, and loosened, and that therefore it was necessary to furnish props to support the roof, and prevent same from falling. *The knowledge of this extraneous fact, to wit, the percolating water, was such as to charge the Mining Company with knowledge of the danger resulting*

from the water, making it necessary that the company support the roof, so loosened by the water, with necessary props or supports.

In the case of Himrod Coal Co. v. Clark, 64 N. E. 284, there was evidence that *the mine manager was informed of the dangerous condition of the roof of the mine two days before the accident occurred.* A verdict for plaintiff was sustained for the reason that the company had actual knowledge of the dangerous condition.

Many other cases to the same effect might be cited, but the foregoing are typical, and correctly announce the law applicable to cases of this character.

(g) The opinion concludes as follows:

> *"And from the whole evidence it is not an unreasonable inference that the place could have been made safe by the use of proper precautions",*

which is equivalent to saying that in any event, and under all conditions, a mining company must make the place of work of its employes absolutely safe. In other words, the employer is an insurer of his employes' safety under all circumstances and conditions. It is so elementary in the law of master and servant that a master is not an insurer of his servants' safety, that we hesitate to cite authority, but in order to emphasize the error of the opinion in this regard, we submit an unquestioned authority:

In the case of Thompson v. California Construction Company, 148 Cal. 35, the Supreme Court of California said:

"The law imposes on a master or employer only the obligation to use reasonable or ordinary care, skill and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged. The statement that it is the duty of the employer to furnish an employe with a reasonably safe place in which to work is a defective statement of the law. *The duty of the employer in this respect is not absolute. He is not required at all hazards to furnish a reasonably safe place. His duty is fulfilled when he exercises ordinary care for that purpose.* * * *

We think the motion for a nonsuit should have been granted. The evidence shows that the defendant was in control of a rock quarry in which the plaintiff was employed; that the business carried on was that of blasting rock out of a cliff of rock some fifty or sixty feet high, and loading large, irregular pieces of rock thus obtained upon cars standing at the foot of the slope upon which the rock lay. * * *

There is no evidence that the defendant or any of its agents or servants had any better knowledge, or any better means of knowledge of the danger arising from the sliding of rocks down the cliff than that possessed by the plaintiff. * * *

The rule applicable to such cases is that the master is not liable for dangers existing in the place where the servant is assigned to work unless the master knows of the dangers or defects, or might have known thereof if he used ordinary care or skill to ascertain them. * * *

The plaintiff had the burden of proving that his injury was due to the negligence of the defendant. There was no evidence of such neglect other than the fact that the rock slipped down and caused the injury. Under the circumstances above stated, the mere hap-

> pening of the accident is not *prima facie* evidence of neglect on the part of the master. * * *
>
> The motion for nonsuit should have been granted upon the ground that it is now shown that the defendant was negligent with respect to the safety of the place in which the plaintiff was at work at the time of the injury."

(h) The theory upon which this case was submitted to the jury was the fact that *"ore was allowed to remain on the hanging-wall"*.

This Court has approved it. To so hold means that the doctrine of *res ipsa loquitur* is applied. *This is error.* The United States Supreme Court and this Court have held this doctrine inapplicable to the relations of master and servant.

> Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658;
> Mt. Copper Co. v. Van Buren, 123 Fed. 61.

II.

The opinion holds:

> "*Some of the state courts have adopted a restricted rule of interstate comity which, if applied in this case, would fully sustain the defendant's contention.* But in the Federal Courts, following the lead of the Dennick case, in which Mr. Justice Miller declared a liberal rule of comity, the tendency has been to establish a broader rule, a rule which concurs, we think, with enlightened procedure, justice and common sense."

The vice of applying the doctrine of the Dennick case to the case at bar lies in the fact, that to do so this Court must apply a doctrine contrary to the rule declared by the Supreme Court of the State of Nevada.

In determining questions of this character it is the established rule that Federal Courts will treat the question exactly the same way as though it were a court of the state in which it was sitting. In other words, in applying the doctrine of comity to this case, this Court should apply the doctrine which has been declared by the Supreme Court of the State of Nevada.

56 L. R. A. 197.

The restricted rule of interstate comity which the opinion concedes has been adopted by some of the states, is the rule adopted by the State of Neveda.

Christensen v. Floriston Pulp and Paper Co., 29 Nev. 552; 92 Pac. 210.

The weight of authority holds that when a cause of action depends upon a statute of another state, that there must be a statute in the forum similar to that of the place where the cause of action arose.

56 L. R. A. 203, and cases cited.

A few of the states have adopted a contrary rule, holding against the necessity of a similar statute in the forum.

Herrick v. Minnesota Ry., 31 Minn. 11; 56 L. R. A. 204.

The Dennick case is not an authority for the liberal rule of comity which this Court has applied in this case, *for the reason that in that case there was in fact a statute in New York, where the action was, similar to that of New Jersey, where the cause of action arose.* Hence the question was not presented, and did not arise, and therefore this case should not be deemed an authority upon so important a point, as at most the language used was dictum. We submit that this Court should be thoroughly convinced of the correctness of its position before applying the doctrine of the Dennick case, for the reason that to do so would be contrary to the established law of the State of Nevada on the same subject.

The Mining Company in this case is in rather an anomalous position. We are sued in the State of Nevada for damages for an accident happening within the State of California. Admittedly the substantive law of California is different than the substantive law of the State of Nevada. The lower Court applied the substantive law of California, and the adjective law of Nevada. This Court applies what may be termed the federal doctrine; entirely different from either California or Nevada.

The United States Supreme Court in Stewart v. Baltimore Railway, 168 U. S. 445, expressly recognized the distinction which we make in this case when it said:

> "Where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced."

There can be no question but that the statute law of the State of California applicable to this case is radically and fundamentally different from the statute law of the State of Nevada.

The public policy of a state is to be determined by its statute law, and it is not necessary that a law be against good morals to be contrary to the public policy of a sister state. Numerous decisions can be cited which so hold.

The law is correctly declared in a very liberal note covering the entire subject, found at 56 L. R. A. 193. We submit, therefore, that in determining this branch of the case the law applicable thereto, as declared by the Supreme Court of Nevada, should be adopted and applied by this Court.

III.

Damages to the amount of twelve thousand five hundred dollars ($12,500) were awarded to Cunningham for a broken leg, and this amount by a jury of the State of Nevada under a law of the State of California depriving the Mining Company of the defense of contributory negligence, but per-

mitting such defense under what is known as the comparative negligence doctrine.

Cunningham was an ordinary day laborer, uneducated, unskilled, and, at the time of his injury, was receiving a wage of $4 per day.

He was in good health, was not suffering under any disability, and a man of ordinary intelligence. He knew of the ore on the hanging-wall. He was not deceived in any way. He made no objection to working in that mine. He made no request that the ore be removed, or that the mine be timbered at this particular point. As a matter of fact the evidence discloses that he had as much, if not more knowledge, than the Mining Company in reference to the danger complained of. We are unable to understand wherein there is any greater degree of negligence on the part of the Mining Company than on the part of Cunningham. *A servant may not disregard an obvious and well known peril. If he does so, and is injured, it is contributory negligence, which bars recovery.*

Brett v. S. H. Frank Co., 153 Cal. 267.

In any event, the damages awarded are excessive.

For the same injuries Cunningham would receive under the Workmen's Compensation, Insurance and Safety Act of the State of California, a maximum of 65% of his average weekly earnings for a period of two hundred and forty weeks, which in this case would amount to a total of three thousand, seven hundred and twenty dollars ($3,720). He would

also be entitled to 20% of such weekly earnings during the remainder of life, which would amount to the sum of five dollars ($5) per week, or a total of two hundred and fifty dollars ($250) a year. Four thousand dollars properly invested would produce sufficient income to make this payment. Therefore, the sum of seven thousand, seven hundred and twenty dollars ($7,720) would be the maximum amount which he would be paid under the present law, recognized to be most liberal in behalf of employes.

We know of no cases of upholding a verdict of this magnitude for a broken leg, *especially where no wilful misconduct is proved against the employer.*

For the foregoing reasons, and that we may have an opportunity to more clearly present the case, we respectfully ask that a rehearing be granted.

Dated, San Francisco,
June 2, 1915.

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Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above-entitled cause, and that in my judgment the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

A. H. JARMAN,
Of Counsel for Plaintiff in Error and Petitioner.